

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

TERRENCE HODGKIN,

Defendant.

Case No. 2:16-cr-00355-KJD-VCF  
No. 2:20-cv-01085-KJD

**Order**

Presently before the Court is Movant's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (#76). The Government filed a Motion for Leave to Advise the Court of New Supreme Court Authority (#79) but did not file an actual response to Movant's motion. Movant responded in opposition (#80) to which the Government replied (#81). For the reasons stated below, Movant's motion is denied.

**I. Factual and Procedural Background**

Terrence Hodgkin ("Hodgkin" or "Defendant") was convicted, on his guilty plea, of unlawful possession of a firearm by a previously convicted felon. (#57/56). He now requests that the Court vacate his sentence under 28 U.S.C. § 2255, asserting that his indictment and subsequent conviction are invalid.

Hodgkin has a lengthy criminal history, dating back to 2008 at age 16. Over the next 8 years, Hodgkin was convicted of various offenses, including two felonies—battery involving a deadly weapon and possession of a firearm by a former felon. (PSR, at 9-15). On his first felony conviction, in 2008, the state court sentenced him to 24-60 months in state prison, but ultimately; however, his sentence was suspended, with additional conditions imposed, one of which prohibited him from possessing firearms. Id. at 9. In 2013, Hodgkin was again sentenced to 12-32 months in prison for a second felony—possession of a firearm by an ex-felon. Id. at 12. He was released after serving approximately one year in prison. Id.

In February 2018, Hodgkin pleaded guilty according to a plea agreement with the government to unlawful possession of a firearm by a previously convicted felon. (#56). In the plea agreement, Hodgkin admitted that he knowingly possessed the firearm, and that when he

1 did, he had been previously convicted of a crime punishable by a term of imprisonment  
2 exceeding one year. (#57, at 5).

3 In August 2018, this Court sentenced Hodgkin to 30 months' imprisonment followed by  
4 three years of supervised release. (#70/69). Hodgkin did not appeal, and his conviction became  
5 final on September 19, 2018.

6 On June 16, 2020, Hodgkin filed this motion to vacate, arguing that the indictment was  
7 defective because it "failed to allege Mr. Hodgkin knew, at the time of the alleged firearm  
8 possession, that his prior conviction was punishable by more than a year of imprisonment or  
9 knew that his previous conviction barred him from possessing a firearm." (#76, at 4). Hodgkin  
10 further argues that "[t]he resulting conviction, based on the fatally defective indictment, must  
11 therefore be vacated and the indictment dismissed." Id. Lastly, Hodgkin argues that defective  
12 indictment deprived this Court of jurisdiction and violated his Fifth and Sixth Amendment rights.  
13 Id. at 12.

#### 14 II. Legal Standard

15 28 U.S.C. § 2255 allows a federal prisoner to seek relief under four grounds: (1) "the  
16 sentence was imposed in violation of the Constitution or laws of the United States;" (2) "the  
17 court was without jurisdiction to impose such a sentence;" (3) "the sentence was in excess of the  
18 maximum authorized by law;" and (4) the sentence is "otherwise subject to collateral attack." 28  
19 U.S.C. § 2255(a).

20 Under 18 U.S.C. § 922(g), it is "unlawful for any person" who falls within one of nine  
21 enumerated categories to "possess in or affecting commerce any firearm or ammunition."  
22 Section 924(a)(2) sets out the penalties applicable to "[w]however knowingly violates" § 922(g).  
23 Before June 2019, courts treated the knowledge requirement in § 924(a)(2) as applying only to  
24 the defendant's possession of a firearm or ammunition, not to the fact that he fell within the  
25 relevant enumerated category. But on June 21, 2019, the Supreme Court issued its decision in  
26 Rehaif v. United States, 139 S. Ct. 2191 (2019), holding that a defendant's knowledge "that he  
27 fell within the relevant status (that he was a felon, an alien unlawfully in this country, or the  
28 like)" is an element of a § 922(g) offense. Id. at 2194. This decision applies to all § 922(g)

1 categories, including felons under § 922(g)(1). A felon is one who has been convicted of a crime  
 2 punishable by more than one year of imprisonment.

3 In Rehaif, the Supreme Court stated:

4 The question here concerns the scope of the word “knowingly.”  
 5 Does it mean that the Government must prove that a defendant knew  
 6 both that he engaged in the relevant conduct (that he possessed a  
 7 firearm) and also that he fell within the relevant status (that he was  
 8 a felon, an alien unlawfully in this country, or the like)? We hold  
 9 that the word “knowingly” applies both to the defendant’s conduct  
 and to the defendant’s status. To convict a defendant, the  
 Government therefore must show that the defendant knew he  
 possessed a firearm and also that he knew he had the relevant status  
 when he possessed it.

10 Id. Rehaif does not stand for the proposition that the government must prove the defendant  
 11 knew his possession of the firearm was unlawful. Rehaif requires proof of the defendant’s  
 12 felonious status. So, in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the government  
 13 must prove that (1) the defendant knew he possessed a firearm and that (2) he knew he belonged  
 14 to the relevant category of persons barred from possessing a firearm. See id. at 2200. To hold  
 15 otherwise would mean that pure ignorance of the United States Code was a sufficient defense.

16 The Supreme Court also recently held that “[i]n felon-in-possession cases, a Rehaif error is  
 17 not a basis for plain-error relief unless the defendant first makes a sufficient argument or  
 18 representation on appeal that he would have presented evidence at trial that he did not in fact  
 19 know he was a felon.” Greer v. United States, 141 S. Ct. 2090, 2093 (2021). The Court held that  
 20 for the felons-in-possession in that case, they must have shown that had the Rehaif errors been  
 21 correctly advised, there was a “reasonable possibility” they would been acquitted or not have  
 22 plead guilty. Id. The Court held that it was unlikely they would have carried that burden because  
 23 both had been convicted of multiple felonies before and those “prior convictions are substantial  
 24 evidence that they knew they were felons.” Id. The Court also rejected the argument that a  
 25 Rehaif error is a structural one that requires automatic vacatur and held that “Rehaif errors fit  
 26 comfortably within the ‘general rule’ that ‘a constitutional error does not automatically require  
 27 reversal of a conviction.’” Id. (quoting Arizona v. Fulminante, 499 U.S. 279, 306 (1991)).

28 //

1     III.     Analysis

2     Hodgkin argues that in light of Rehaif, his sentence is unconstitutional and must be vacated  
 3     because (1) the indictment failed to allege a cognizable crime against the United States and  
 4     therefore stripped the Court of jurisdiction; (2) the grand jury was not required to find probable  
 5     cause as per the defective indictment which violated his Fifth Amendment rights; (3) the  
 6     indictment violates his Fifth Amendment right not to be tried without an indictment, which is  
 7     violated when a defendant is tried on a defective indictment; and (4) he was not informed of the  
 8     nature and cause of the accusation which violated his Sixth Amendment rights. (#76, at 13-14).  
 9     The Court begins by analyzing whether it has jurisdiction to adjudicate Hodgkin’s motion.

10     **A. Jurisdiction**

11     Hodgkin argues that his indictment failed to describe the criminal conduct as per Rehaif,  
 12     which constitutes a fatal defect and deprived the Court of jurisdiction. (#76, at 15). However, the  
 13     Ninth Circuit has ruled on this identical argument, holding that “the indictment’s omission of the  
 14     knowledge of status requirement did not deprive the district court of jurisdiction.” United States  
 15     v. Espinoza, 816 Fed. Appx. 82, 84 (9th Cir. 2020). “The Supreme Court has explicitly rejected  
 16     ‘the view that indictment omissions deprive a court of jurisdiction . . .’ and this holding applies  
 17     where ‘an indictment fails to allege the specific intent required’ for a crime[.]” Id. (quoting  
 18     United States v. Cotton, 535 U.S. 625, 631 (2002)); United States v. Velasco-Medina, 205 F.3d  
 19     839, 845-46 (9th Cir. 2002). Therefore, the Court rejects Hodgkin’s argument that this Court  
 20     lacked jurisdiction.

21     **B. Fifth Amendment Rights**

22     Hodgkin also argues that because of the insufficient indictment, his Fifth Amendment rights  
 23     were violated, and his sentence should be vacated. (#76, at 16-19). Specifically, Hodgkin argues  
 24     that the “indictment failed to state a valid claim by not alleging all essential elements under §§  
 25     922(g) and 924(a)(2)—meaning the grand jury did not find probable cause on all required  
 26     elements.” (#76, at 18). Hodgkin also argues that the failure to include the essential Rehaif  
 27     element amounts to an “indictment [that] describes lawful conduct” and that he should not have  
 28     been tried based off this faulty indictment. Id. at 18-19. Furthermore, he asserts that because

1 these are structural errors, a showing of prejudice is not required. Id. The Court disagrees.

2 First, “[i]n this circuit an indictment missing an essential element that is properly challenged  
3 before trial must be dismissed.” United States v. Qazi, 975 F.3d 989, 991 (9th Cir. 2020).

4 Hodgkin has not presented any evidence that he properly challenged his indictment before trial.

5 Moreover, the Supreme Court has held that a Rehaif error is not a structural one, so Hodgkin  
6 must show actual prejudice. In Greer, the Court explained that “[s]tructural errors are errors that  
7 affect the ‘entire conduct of the [proceeding] from beginning to end’ and consist of things like  
8 ‘the denial of counsel of choice, denial of self-representation, denial of a public trial, and failure  
9 to convey to a jury that guilt must be proved beyond a reasonable doubt.’” Greer, 141 S. Ct. at  
10 2100. There, the Court held that “the omission of a single element from jury instructions or the  
11 omission of a required warning from a Rule 11 plea colloquy— are not structural because they do  
12 not ‘necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for  
13 determining guilt or innocence.’” Id. (quoting Neder v. United States, 527 U.S. 1, 9 (1999)). The  
14 Court finds that here, the omission of the Rehaif requirement in the indictment does not amount  
15 to a structural error because it did not render Hodgkin’s legal proceedings fundamentally unfair  
16 or an unreliable vehicle for him deciding to plead guilty. As noted in Greer, “[i]f a person is a  
17 felon, he ordinarily knows he is a felon.” Greer, 141 S. Ct. at 2097. “Felony status is simply not  
18 the kind of thing that one forgets.” Id. (quoting United States v. Gary, 963 F.3d 420, 423 (4th  
19 Cir. 2020)). Hodgkin has not made an argument that he did not know he was a felon, nor has he  
20 made a sufficient argument that the indictment truly did infect the entire judicial proceeding such  
21 that he would have changed his guilty plea.

### 22 **C. Sixth Amendment Rights**

23 Hodgkin makes a similar argument regarding his Sixth Amendment rights—“because the  
24 indictment omitted an essential element, there was no notice to Mr. Hodgkin of this element, and  
25 Mr. Hodgkin could not prepare a thorough defense.” (#76, at 20). The Court does not find this  
26 convincing. Again, Hodgkin has not made any representations that he did not know of his  
27 felonious status at the time he possessed the gun, and he has not shown in any way that it  
28 affected his guilty plea. Furthermore, as stated above, Hodgkin had previously pleaded guilty in

1 state court to unlawful possession of a firearm by a previously convicted felon. (PSR, at 12). As  
 2 such, any argument that “[d]efense counsel could not investigate whether Mr. Hodgkin knew his  
 3 prohibitive status at the time of the alleged possession” is utterly without merit. (See #76, at 20).

4 Hodgkin also asserts this was a structural error that entitles him to relief without showing  
 5 prejudice. Id. at 21. However, as clarified in Greer and explained above, this was not a structural  
 6 error. Hodgkin stipulated in his guilty plea that he had a handgun in his possession and that at the  
 7 time of his possession he had been convicted of a crime punishable by a term of imprisonment  
 8 exceeding year. (#57, at 5). Further, the Supreme Court reasoned that when a defendant  
 9 considers pleading guilty for this charge, he will usually recognize that as a felon, a jury would  
 10 find he knew he was a felon when he possessed the gun and would likely factor that in when  
 11 making the decision. Greer, 141 S. Ct. at 2097. “In short, if a defendant was in fact a felon, it  
 12 will be difficult for him to carry the burden on plain-error review of showing a ‘reasonable  
 13 probability’ that, but for the Rehaif error, the outcome of the district court proceedings would  
 14 have been different.” Id. Hodgkin has not made a showing that his Sixth Amendment rights were  
 15 violated because of the Rehaif error and as per Greer, his sentence will not be vacated.

#### 16 IV. Certificate of Appealability

17 Finally, the Court must deny a certificate of appealability. To proceed with an appeal,  
 18 petitioner must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P.  
 19 22(b); 9th Cir. R. 22-1; Allen v. Ornoski, 435 F.3d 946, 950-51 (9th Cir. 2006); see also United  
 20 States v. Mikels, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a petitioner must make “a  
 21 substantial showing of the denial of a constitutional right” to warrant a certificate of  
 22 appealability. Id.; 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).  
 23 “The petitioner must demonstrate that reasonable jurists would find the district court's  
 24 assessment of the constitutional claims debatable or wrong.” Id. (quoting Slack, 529 U.S. at 484).  
 25 To meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues are  
 26 debatable among jurists of reason; that a court could resolve the issues differently; or that the  
 27 questions are adequate to deserve encouragement to proceed further. Id. Hodgkin has not met his  
 28 burden in demonstrating that there was any reasonable probability that he did not know that he

1 was a felon and, therefore, prohibited from possessing a firearm.

2 V. Conclusion

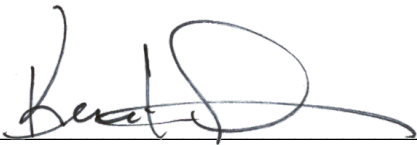
3 Accordingly, **IT IS HEREBY ORDERED** that Movant's Motion to Vacate, Set Aside, or  
4 Correct Sentence under 28 U.S.C. § 2255 (#79) is **DENIED**.

5 **IT IS FURTHER ORDER** that the Government's Motion for Leave to Advise the Court of  
6 Legal Developments (#79) is **DISMISSED**.

7 **IT IS FURTHER ORDERED** that the Clerk of the Court enter **JUDGMENT** for  
8 Respondent and against Movant in the corresponding civil action, 2:20-cv-01085-KJD, and close  
9 that case.

10 **IT IS FURTHER ORDERED** that Movant is **DENIED** a Certificate of Appealability.

11  
12 Dated this 12<sup>th</sup> day of June 2024.

13  
14  
15 

16 Kent J. Dawson  
17 United States District Judge  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28